Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

PAUL H. STITT,

PETITIONER.

-V-

CNG TRANSMISSION CORPORATION,

RESPONDENT,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the courts below fail to properly apply precedent from this Court regarding takings for which just compensation must be paid in holding that a permanent encumbrance fifty feet wide could be implied in favor of a public utility that had acquired through eminent domain only a thirty-inch-wide permanent encumbrance with limited maintenance rights?

2. Did the courts below err in holding that the determination of the property interest condemned turned on "what the Board of Viewers thought was being condemned" rather than on the declarations of the condemnor as to what was being condemned?

3. Did the courts below err in concluding that just compensation had been paid, based on the erroneous conclusion that the differential between the $4,000 estimate of the condemnor as to the value of the property and the ultimate award of $38,000 was attributable to a determination of the Board of Viewers that the easement being condemned was greater than thirty inches wide, notwithstanding the declarations of the condemnor?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit affirming the district court's decision was handed down on August 12, 1996. (App. at 1.)[1] The petition for rehearing by the Third Circuit was denied September 16, 1996. (App. at 24.) The district court filed an order and opinion on November 30, 1995. (App. at 8.)

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1332, the Petitioner filed this action in the United States District Court for the Western District of Pennsylvania. Jurisdiction over the parties existed and venue was proper in the United States District Court for the Western District of Pennsylvania.

A final judgment was entered for CNG by the United States District Court for the Western District of Pennsylvania on November 30, 1995. (App. at 8.) Stitt filed a timely appeal in the United States District Court for the Western District of Pennsylvania on December 15, 1995. The Court of Appeals for the Third Circuit had jurisdiction in this case pursuant to 28 U.S.C. § 1291.

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[1]Throughout this petition, the designation "App." refers to the Appendix submitted with this Petition; the designation "J.A." refers to the Appendix filed in the Third Circuit Court of Appeals.

The Third Circuit Court of Appeals affirmed the final judgment of the district court on August 14, 1996. (App. at 6.) A petition for rehearing was denied September 16, 1996. (App. at 24.) The jurisdiction of this Court to review the decision of the Third Circuit Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. Nature Of The Case.

Petitioner CNG Transmission Corporation ("CNG" or "the condemnor") brought this action against the Petitioner Paul H. Stitt ("Stitt"), seeking to enjoin Stitt from interfering with its installation of a new pipeline on its easement over Stitt's land. CNG also sought a declaratory judgment that (1) CNG has the right to install a new pipeline on this easement, and (2) its easement over Stitt's land is fifty feet wide. The Magistrate, in the opinion dated November 30, 1995, held for CNG. On August 14, 1996, a Panel of the Court of Appeals for the Third Circuit upheld the district court's order.

The sole issue before the Magistrate was the width of the easement owned by CNG which extends across the property of Stitt. (App. at 12.) The Magistrate determined that because there was ambiguity regarding the precise width of the easement, a fifty-foot-wide easement would be implied. (App. at 20.) On appeal, Stitt argued that the Magistrate's refusal to fully consider the record of the Board of Viewers' meeting of Thursday, March 28, 1974 was an error of law. The Magistrate refused to allow evidence other than statements made by a witness who was present at the trial, citing hearsay considerations. The Magistrate also failed to consider or refer in its opinion to the testimony of the condemnor's chief witness, Michael Van Doren, who repeatedly testified that "[t]he easement of Consolidated Gas Corporation is of a 30 inch width." (J.A. at 89a.)

B. Statement Of The Facts.

Stitt owned certain parcels of land in South Beaver Township, Beaver County, Pennsylvania. (App. at 13.) In 1968, CNG acquired an easement through the eminent domain process for the construction, operation, and maintenance of a thirty-inch natural gas pipeline across the lands of Petitioner Stitt. (App. at 13.) The Board of Directors of Consolidated Gas Service Corporation ("CGSC"), CNG's predecessor, passed a resolution appropriating an easement across the lands of Stitt. (App. at 13.) The easement required that 2,185 feet of pipeline would transverse the property of Stitt. (App. at 13.) On June 18, 1968, CGSC filed a petition for Arrival and Order for Filing Bond in the Court of Common Pleas of Beaver County, Pennsylvania, seeking the approval of the bond and the right to enter and appropriately use the easement. (App. at 14.) Subsequent to the denial of a set of preliminary objections filed by Stitt, the court issued an order dated August 27, 1968 granting possession of the easement to CGSC as of September 10, 1968. (App. at 14.)

On April 6, 1995, CNG filed a two-count Verified Complaint, a Motion for Preliminary Injunction, and a Motion Requesting Hearing Date on Preliminary Injunction. (App. at 14-15.) In the first count, CNG sought a preliminary injunction which (1) would restrain Stitt from interfering with the placement of a thicker-walled pipeline to be laid at the same depth and in the same location as the original easement, and (2) would require Stitt to allow CNG personnel and its contractors to have access to the site of the pipeline. (App. at 15.) On April 28, 1995, the court executed a Stipulated Consent Decree effectively resolving the relief requested by CNG

in Count I of the Complaint. (App. at 15.) In Count II of the Complaint, CNG requested a declaratory judgment establishing that the width of the easement be designated as fifty feet. (App. at 15.)

REASONS FOR GRANTING THE WRIT

I. THE COURTS BELOW FAILED TO PROPERLY APPLY THE PRECEDENT OF THIS COURT REGARDING TAKINGS FOR WHICH COMPENSATION MUST BE PAID IN HOLDING THAT A PERMANENT ENCUMBRANCE FIFTY FEET WIDE COULD BE IMPLIED FROM A THIRTY-INCH-WIDE PERMANENT ENCUMBRANCE WITH LIMITED MAINTENANCE RIGHTS.

As the Supreme Court held in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the power to exclude is traditionally considered one of the most treasured strands in an owner's bundle of property rights. *See also Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (right to exclude others is essential); *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980) (essential stick in bundle of property rights is right to exclude others).

In the instant case, the district court held that, because the condemnor, in order to make full use of the pipeline, presently needs an easement more than fifteen

times the width of the one it acquired in 1968, a right to such an expanded easement could be implied regardless of what the condemnor paid for the easement, or what the condemnor declared that it was taking. Although the Third Circuit Court of Appeals was clearly uncomfortable relying on such a nakedly erroneous rationale, the Panel upheld the district court nonetheless. The Panel's decision, however, rested primarily on the erroneous conclusion that the condemnor had obtained a maintenance easement in addition to its thirty-inch-wide permanent encumbrance, and that there was no meaningful distinction to be made between a thirty-inch-wide permanent encumbrance with a maintenance easement and a fifty-foot-wide permanent encumbrance. Neither the decision of the district court nor that of the Third Circuit comports with precedent handed down by this Court construing the rights of property owners under the Fifth Amendment to the United States Constitution.

As the discussion below shows, the Panel's conclusion that the condemnor acquired a maintenance easement is in error. Even assuming, however, that the condemnor had acquired a limited implied maintenance easement, such a right is not the equivalent to a permanent 50-foot-wide easement. If the condemnor had acquired a maintenance right of way, Stitt would still retain the precious right of a property owner to exclude CNG and all others from his property, with the sole exception that CNG would have the right to enter for the limited purposes of maintaining the line.

The Third Circuit's decision is therefore in conflict with the Supreme Court's decision in *Loretto*, for it ignores the importance of this right of exclusion, which, before the decision in the instant case, Stitt still retained. The Third

Circuit's decision is also in direct conflict with *Louis W. Epstein Family Partnership v. Kmart Corp.*, 13 F.3d 762 (3d Cir. 1994).

The statements of Van Doren before the Board of Viewers clearly demonstrate that the condemnor chose to condemn only a thirty-inch-wide easement. When asked what factors he considered when placing a value on the condemned property, Van Doren stated that he "[c]onsidered that the easement taken was the width of a 30-inch gas transmission line and does not include any rights to lay any additional lines." (J.A. at 86a.) Van Doren also compared the easement taken by CGSC to another easement over Stitt's land that was taken by a utility. In comparing the two easements, Van Doren stated:

> [I] [c]onsidered that there currently exists a *50 foot easement* approximately 2,000 feet in length through the subject property. . . . The easement of Consolidated Gas Corporation is of a *30 inch width* and is parallel to this easement and thirty feet south of it. . . . The subject easement (CGSC) being only five feet from the 50 foot easement and *only 30 inches in width* does not materially affect the severed portions for the distance that they run parallel[.]

(J.A. at 89a (emphasis added).) As this testimony makes clear, CNG, at the time of the taking of the easement, acquired and appropriated a thirty-inch easement, and the appraiser repeatedly distinguished between the fifty-foot easement of Manufacturers Light and Heat Company and

the thirty-inch CGSC easement. Certainly, CGSC was attempting, at that time, to limit the amount of compensation that it had to pay Stitt for the interest it acquired.

The trial court simply ignored Van Doren's testimony. As the Panel acknowledged, this testimony was unequivocal: "Van Dorn [sic] testified that the easement was 30 inches in width." (App. at 3.) Although the Panel acknowledged that it would have been error to refuse to consider Van Doren's testimony, the Panel stated that the Magistrate-Judge "did consider the transcript of the condemnation hearing and the transcript included Van Dorn's [sic] testimony." (App. at 3.) The Panel excuses the Magistrate-Judge's failure to mention the testimony of Van Doren by stating that "the ultimately significant fact from that hearing was not what Van Dorn [sic] thought was being condemned, but what the Board thought was being condemned, because that was the basis on which it made its award." (*Id.*)

It should be remembered, however, that it was the prerogative of the condemnor, not the Board, to determine the extent of the easement. Thus, it is difficult to see how what the Board thought, even if relevant, can be divorced from what the Board *was told* by the condemnor. Surely, the most compelling evidence in the record regarding what the Board thought was being condemned is the testimony of the condemnor's agent and witness, Van Doren.

Significantly, the only portion of the record which the Panel identifies as being in conflict with Van Doren's testimony is of no evidentiary value and, furthermore, is not inconsistent with Van Doren's testimony. The Panel's conclusion that the Board thought more than a thirty-inch-

wide easement was being condemned is based entirely on statements by the condemnor's attorney made to a member of the Board of Viewers to the effect that the condemnor would have an implied right to enter the property for purposes of maintaining the pipe on the thirty-inch easement. (App. at 3-4.) Counsel for the condemnor specifically stated, however, that "there are no specific rights condemned for this purpose [of maintenance]." (App. at 4.)

Thus, the only portion of the proceedings identified by the Panel, even if considered evidence, establishes at the very most that the Board of Viewers thought that the condemnor would have a right, although not one specifically being condemned, to temporarily enter the property solely for the purpose of maintenance. If this were the only right conferred upon the condemnor by the Magistrate-Judge's order, the Panel's analysis might be correct. But the Magistrate-Judge's order does not confer a merely temporary maintenance easement to service the thirty-inch pipeline, but rather grants to the condemnor a permanent encumbrance fifty feet wide.

In *Louis W. Epstein Family Partnership v. Kmart Corp.*, the court stated that "'the owner of land, who grants a right of way over it, conveys nothing but the right of passage and reserves all incidents of ownership not granted.'" 13 F.3d at 766 (quoting *Mercantile Library Co. v. Fidelity Trust Co.*, 235 Pa. 5, 83 A. 592, 595 (1912)). In the case at bar, there is no evidence that the condemnor acquired anything more than a thirty-inch right of way. The Panel reasons, however, that because the Board of Viewers "thought" that the condemnor would also be able to enter for the purpose of maintenance, the Board of Viewers awarded Stitt more than it otherwise would have

for the easement.[2] At most, however, the Panel's analysis suggests that the condemnor may have possessed an implied right of maintenance.

As the court held in *Louis W. Epstein Family Partnership v. Kmart Corp.*, an implied right of maintenance does not carry with it the presumption that the parties intended a permanent encumbrance. Thus, the court held that an implied right to maintain a sign on the servient estate did not support a finding that the dominant estate had acquired a permanent right to maintain the sign.

In the case at bar, the Panel upheld the Magistrate-Judge's grant of a permanent encumbrance fifty feet in width based only on its conclusion that the Board of Viewers thought that the condemnor would have an implied right to enter the property to maintain the pipeline on its thirty-inch easement. It is clear, however, that a thirty-inch easement with an implied right of entry for maintenance is not the equivalent of a fifty-foot-wide permanent encumbrance. Yet the Panel's decision rests entirely on the notion that these two property rights are equivalent.

This Court has consistently held that compensation must be paid for any physical occupation of private land for a public purpose. As the Court has stated in several

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[2]As discussed in Part III, however, this assumption is clearly incorrect; the Board of Viewers' award was based not on the width of the easement being possibly more than thirty inches but rather on the damages to the underlying property which would have occurred regardless of the easement's width.

cases addressing this issue, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *see also Yee v. City of Escondido, California*, 503 U.S. 519 (1992) (if landowner is required to submit to a physical occupation of land, a taking has occurred) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 426). In the present case, the right to a 50-foot-wide encumbrance was conferred by the district court upon the condemnor, when compensation for only a thirty-inch-wide easement was paid to the condemnee. This holding treats as meaningless significant strands of a property owner's rights recognized by the Supreme Court as requiring compensation for their taking. Because the holding conflicts with recent decisions of this Court, pursuant to Supreme Court Rule 10(c), this Court should grant the petition for certiorari and reverse the holding of the lower court.

II. THE COURTS BELOW ERRED, AS A MATTER OF LAW, IN HOLDING THAT THE DETERMINATION OF THE PROPERTY INTEREST CONDEMNED TURNED ON "WHAT THE BOARD OF VIEWERS THOUGHT WAS BEING CONDEMNED" RATHER THAN ON THE DECLARATIONS OF THE CONDEMNOR AS TO WHAT WAS BEING CONDEMNED.

On appeal, Stitt argued that the district court had erred in failing to consider the testimony of Michael Van Doren, an agent of the condemnor and the primary witness for the condemnor. The testimony and declarations of Van Doren are critical in this case because Van Doren's testimony, along with the only document referring to the width of the easement, constitutes the declaration of the condemnor regarding the extent of the property interest it had taken. The issue on appeal was the extent of the property interest taken by the condemnor, specifically, whether the condemnor acquired an easement thirty inches wide or one fifty feet wide. By centering its analysis on "what the board of viewers thought was being condemned" rather than on what the condemnor declared it had taken, the Panel misapprehended the manner in which property is condemned under Pennsylvania law.

Under Pennsylvania law, both as it existed at the time of the taking and as it now exists, public utilities such as the condemnor in the case at bar are given the power of eminent domain. Under the procedure in place before 1968, a gas company could acquire an easement over

private property simply upon passage of a resolution by the board of directors and presentment of a bond to the landowner. Indeed, this is precisely how the condemnor in the case at bar attempted to acquire an easement over Stitt's property in 1968, and the Resolution by which the condemnor sought to acquire the property specifically referred only to a figure of thirty inches as the width of the easement. The Supreme Court of Pennsylvania had recently held, however, that a utility was required to comply with the Eminent Domain Act of 1964, thus forcing utilities to file a Declaration of Taking. *In re McConnell Appeal*, 428 Pa. 270, 236 A.2d 796 (1968). The condemnor in the instant case failed to comply with this requirement. Stitt's counsel objected, but after a series of petitions an order was filed on September 10, 1968 allowing the condemnor entry onto the property after payment of $4,000, which amount the condemnor had estimated as the value of the easement.

Thus, the Resolution of the Board of Directors of the condemnor functioned as the equivalent of a Declaration of Taking. This Resolution declared that the condemnor was taking a "right-of-way to construct, operate, and maintain a thirty-inch pipeline over and across certain tracts of land . . . owned by . . . Paul Stitt." (App. at 14.) It is clear that it is the condemnor, not the Board of Viewers, that determines the property interest to be condemned. The only role of the Board of Viewers is to determine damages based on the amount of property declared to have been taken by the condemnor.

As the Panel acknowledged, "Van Dorn [sic] testified that the easement was 30 inches in width." (App. at 3.) The testimony of Van Doren was the only testimony offered by the condemnor regarding the extent of the

property taken and its value. Significantly, it was the condemnor's burden to prove the extent of the property taken, and Van Doren's testimony is unambiguous on this point.

The trial court simply ignored Van Doren's testimony altogether. Recognizing that ignoring this testimony would be error, the Panel acknowledged the testimony but sought to avoid its impact (1) by reasoning that the difference between the value estimated by the condemnor and the ultimate award indicated that the Board of Viewers had ignored the condemnor's declaration of what had been taken (App. at 5), and (2) by relying on statements by the condemnor's attorney made to a member of the Board of Viewers that the condemnor would have the right to enter the property for purposes of maintenance. (App. at 4-5.)

With respect to the latter point, it is well established that statements made during the course of condemnation proceedings by the attorney for one of the parties do not constitute evidence upon which any finding can be based. Thus, the sole evidence of the extent of the property taken supports only a finding that the easement was thirty inches wide. Ignoring this, the Panel simply shifted its focus, stating that "the critical matter presented at the Board hearing is not what Van Dorn [sic] thought was being acquired but what the Board thought was being acquired." (App. at 5.) It is clear, however, that this statement, which is the underpinning of the Third Circuit's decision, is contrary to established law. The Third Circuit's decision must, therefore, be reversed.

III. THE COURTS BELOW ERRED BY ENGAGING IN SPECULATION, WHICH WAS CLEARLY ERRONEOUS, THAT THE DIFFERENTIAL BETWEEN THE $4,000 ESTIMATE OF THE CONDEMNOR AS TO THE VALUE OF THE PROPERTY AND THE ULTIMATE AWARD OF $38,000 WAS ATTRIBUTABLE TO A DETERMINATION BY THE BOARD OF VIEWERS THAT THE EASEMENT BEING CONDEMNED WAS GREATER THAN THIRTY INCHES WIDE, NOTWITHSTANDING THE DECLARATIONS OF THE CONDEMNOR.

Having concluded that the critical inquiry in determining the rights acquired by the condemnor is "what the Board thought was being acquired," the Panel proceeded to find that the differential between the amount estimated by the condemnor for the easement and the amount ultimately awarded supported the finding that the Board had ignored the condemnor's testimony regarding the rights it had acquired. Specifically, the court stated in relevant part as follows:

> Obviously the Board did not adopt Van Dorn's [sic] view, because he would have awarded only $4,000 to Stitt, but the Board awarded Stitt $38,000.00. Therefore, it is clear that the district court considered the testimony of Van Dorn [sic], although it

> treated that testimony as not critical to its decision.

(App. at 5.) As the following discussion shows, this finding is erroneous.

Although the differential between the condemnor's estimate and the ultimate award is unarguably significant, it has no bearing on the width of the easement condemned. The differential was not based on a difference of opinion regarding the width of the easement but was based entirely on the effect of the easement upon coal, clay, subsoil, and drainage on the property.

As the record shows, Van Doren did not consider any of the above-mentioned factors in his appraisal. The testimony of Van Doren shows that he took the following factors into consideration: the effect of a previous fifty-foot easement of Manufacturers Light and Heat Company, approximately 2,000 feet in length, through the subject property (J.A. at 88a), which resulted in severance of the land south of the easement from the main body of land (J.A. at 89a); the sale of the Carl Craft property to Paul H. Stitt (J.A. at 90a); the sale of the property of Blair E. Ferguson to Edward A. Sahli (J.A. at 91a); resale of a part of the above-referenced premises to Robert W. Salloway (J.A. at 91a); the sale of the property of Harry C. Dahlem to Robert F. Gruber (J.A. at 91a); the value of the whole Stitt tract as it existed prior to the condemnation and unaffected by same (J.A. at 91a, 92a); and the value of the whole Stitt tract after the condemnation and affected by same. (J.A. at 92a.) The Record shows that although he was made aware of the following factors, he did not take them into consideration: (a) 91,000 tons of coal on the Stitt property (J.A. at 155a); (b) 238,000 tons of clay on

the Stitt property (J.A. at 155a); (c) coal damages (J.A. at 85a); (d) drain tile damage (J.A. at 86a); (e) commingling of the subsoil with the topsoil (J.A. at 99a); and (f) damage to the drain field and its impact upon the pond on the Stitt property. (J.A. at 107a.)

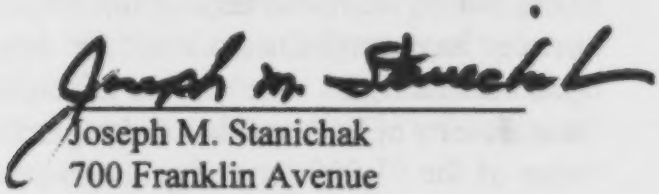
Thus, the difference between the amount estimated by the condemnor and the amount ultimately awarded was based not on any difference in the width of the easement nor on any conjecture as to the impact of implied maintenance rights. Rather, the difference was based on the testimony of William Hummel regarding the impact on value of the 91,000 tons of coal and the 238,000 tons of clay that could not be recovered, the testimony of Stitt regarding the damage to the drain tile and drain field, and the damage caused by the commingling of the subsoil.

To the extent that the Third Circuit's decision was based, in part, on its erroneous conjecture that the difference between the estimate and the award was based on a difference of opinion regarding the easement's width, the decision was in error and should be reversed.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully request that this Court grant this petition and issue of writ of certiorari to the Third Circuit Court of Appeals.

Respectfully submitted,



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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

PAUL H. STITT,

PETITIONER.

-V-

CNG TRANSMISSION CORPORATION,

RESPONDENT,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3700

CNG TRANSMISSION CORPORATION

v.

PAUL H. STITT,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 95-00526)
Magistrate Judge: Honorable Francis X. Caiazza

Submitted under Third Circuit LAR 34.1(a)
August 12, 1996

BEFORE: GREENBERG and ALITO, Circuit Judges,
and FISHER, District Judge*

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*Honorable Clarkson S. Fisher, Senior Judge of the United States District Court for the District of New Jersey, sitting by designation.

(Filed: **Aug 14 1996** 1996)

MEMORANDUM OPINION OF THE COURT

GREENBERG, Circuit Judge.

Paul H. Stitt appeals from a final judgment entered November 30, 1995, in this injunction and declaratory judgment action. The injunction aspects of this case have been resolved and thus we are concerned only with the following declaratory judgment:

> Pursuant to the provisions of the appended opinion, which includes separate Findings of Fact and Conclusions of Law in accordance with Federal Rule of Civil Procedure 52(a), the court finds that fifty feet is the reasonable and necessary width to construct, operate and maintain a thirty inch gas pipeline. Accordingly, the right-of-way obtained by CNG Transmission Corporation through the property of Paul H. Stitt pursuant to the eminent domain process extends to a width of fifty feet, measuring twenty-five feet on each side of the thirty inch pipeline.

Magistrate-Judge Caiazza fully set forth the procedural history and facts of the case in his opinion of November 30, 1995, and, as we are in accord with his findings of fact and conclusions of law, we will refer to those documents. We do address, however, Stitt's

argument that the district court failed to consider the testimony of Michael Van Dorn, a real estate appraiser for the condemnor, Consolidated Gas Supply Corporation, the predecessor of the appellee CNG Transmission Corporation, at the hearing before the Board of Viewers. Van Dorn testified that the easement was 30 inches in width.

We reject this argument for the following reasons. Magistrate-Judge Caiazza did consider the transcript of the condemnation hearing and the transcript included Van Dorn's testimony. However, the ultimately significant fact from that hearing was not what Van Dorn thought was being condemned, but what the Board thought was being condemned, because that was the basis on which it made its award. At the end of the hearing, there was a discussion among Arthur S. Herskovitz, the Board chairman, Robert Amalia, a member of the Board, and Samuel C. Holland, Consolidated's attorney, of whether maintenance rights were involved. This discussion was as follows:

> MR. HERSKOVITZ: Let me ask this: He's assuming there is no right-of-way for maintenance. I'm assuming there must have to be a right-of-way for maintenance of this line. Isn't there a right-of-way? Are you saying now that your people cannot come back on this property, Mr. Holland?
>
> MR. HOLLAND: Well, I don't want to get into this, because the only rights we have are those acquired by condemnation, and I think that we have

implied rights as a matter of law to come onto the property for the purposes of maintenance; but there are no specific rights condemned for this purpose.

MR. AMALIA: I think we have to know this, though. There's a difference in consideration, as far as I'm concerned, as one of the people trying to make this award, between a 30-inch pipeline right-of-way and a maintenance right-of-way. Now, will you tell me that? You have to clarify this for me. If you're telling me that that line is the only thing you're going to be involved with, that's one question. If you tell me they're going to have, as implied by law, the right to come in there and maintain that line, that's another factor.

MR. HOLLAND: I think you may fairly assume, Mr. Amalia, that certainly when the condemnation of a right-of-way occurs, the reasonable right to enter for the purposes of maintenance follows.

MR. AMALIA: I would think that; I mean, we have to clarify that.

MR. HOLLAND: I think you can ask this, because if it came to a question of maintenance, of course if Mr. Stitt denied access, they would go into Court and, by injunctive procedures, get permission to go upon the premises for the purposes of maintenance.

MR. HERSKOVITZ: Okay. Thank you.

Mr. HOLLAND: Thank you.

App. at 116-17. It thus became clear that Consolidated was acquiring a right of entry for maintenance and that the Board knew that it was doing so, and would make its award on that basis.

These facts are significant because the critical matter presented at the Board hearing is not what Van Dorn thought was being acquired but what the Board thought was being acquired. Obviously the Board did not adopt Van Dorn's view, because he would have awarded only $4,000 to Stitt, but the Board awarded Stitt $38,000.00. Therefore, it is clear that the district court considered the testimony of Van Dorn, although it treated that testimony as not critical to its decision.

In view of the aforesaid we will affirm the judgment of November 30, 1995.

TO THE CLERK:

Please file the foregoing memorandum opinion.

/s/
Circuit Judge

DATED:

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3700

CNG TRANSMISSION CORPORATION

v.

PAUL H. STITT,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 95-00526)

BEFORE: GREENBERG and ALITO, Circuit Judges,
and FISHER, District Judge*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Western

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*Honorable Clarkson S. Fisher, Senior Judge of the United States District Court for the District of New Jersey, sitting by designation.

District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on August 12, 1996.

On consideration whereof, it is now here ADJUDGED and ORDERED by this court that the judgment of November 30, 1995, be and is hereby affirmed.

Costs taxed against appellant.

ATTEST:

/s/
Clerk

DATED: AUG 14 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

CNG TRANSMISSION CORPORATION, Plaintiff,	)	Civil Action No. 95-526
v.	)	
PAUL STITT, Defendant.	)	MAGISTRATE JUDGE CAIAZZA

ORDER

Pursuant to the provisions of the appended opinion, which includes separate Findings of Fact and Conclusions of Law in accordance with Federal Rule of Civil Procedure 52(a), the court finds that fifty feet is the reasonable and necessary width to construct, operate and maintain a thirty inch gas pipeline. Accordingly, the right-of-way obtained by CNG Transmission Corporation through the property of Paul H. Stitt pursuant to the eminent domain process extends to a width of fifty feet, measuring twenty-five feet on each side of the thirty inch pipeline.

November 30, 1995
Dated

/s/ Francis X. Caiazza
Francis X. Caiazza
U.S. Magistrate Judge

cc:
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

CNG TRANSMISSION CORPORATION, Plaintiff,	)	Civil Action No. 95-526
v.	)	
PAUL STITT, Defendant.	)	MAGISTRATE JUDGE CAIAZZA

OPINION

History

In 1968 the Plaintiff CNG Transmission Corporation (CNG) acquired an easement through the eminent domain process for the construction, operation and maintenance of a thirty-inch natural gas pipeline across the lands of the defendant in this action, Paul H. Stitt (Stitt). CNG is engaged in the business of producing, purchasing, transporting, selling for resale and storing gas in interstate commerce. Because of its status as a natural gas company engaged in interstate commerce, CNG is regulated by the Department of Transportation and the Federal Energy Regulatory Commission (FERC). The facts which necessitated the grant of the easement are these.

On March 11, 1968, the Federal Power Commission issued to Consolidated Gas Supply Corporation (CGSC) a Certificate of Public Convenience and Necessity to construct, operate and maintain a thirty-

inch natural gas pipeline designated as TL-400 for the transmission of gas between Warren County, Ohio and Beaver County, Pennsylvania.[1]

In 1968 Stitt owned certain parcels of land in South Beaver Township, Beaver County, Pennsylvania. The easement required that 2,185 feet of pipeline would transverse the property of Stitt. Because CGSC and Stitt were not able to effectuate an agreement on compensation, its Board of Directors passed a resolution appropriating an easement across the lands of Stitt. Specifically, the resolution states that its intent is to acquire a "right-of-way to construct, operate and maintain a thirty-inch pipeline over and across certain tracts of land . . . owned by . . . Paul Stitt . . . ." No specific width of the easement was included within the terms of the resolution.

On June 18, 1968, CGSC filed a Petition for Approval and Order for Filing Bond in the Court of Common Pleas of Beaver County, Pennsylvania seeking the approval of the bond and the right to enter and appropriately use the easement. Subsequent to the denial of a set of preliminary objections filed by Stitt, the court issued an order dated August 27, 1968 granting possession of the easement to CGSC as of September 10, 1968.

On April 6, 1995, the plaintiff in this action, CNG, filed a two-count Verified Complaint, a Motion for Preliminary Injunction, and a Motion Requesting Hearing Date on Preliminary Injunction. In the first count, the

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[1]The Federal Power Commission is the predecessor to the FERC; the Consolidated Gas Supply Corporation is the predecessor in interest to CNG.

Plaintiff sought a preliminary injunction which would: (1) restrain Stitt from interfering with the placement of a thicker walled pipeline to be laid at the same depth and in the same location as the original easement and (2) require Stitt to allow CNG personnel and its contractors to have access to the site of the pipeline. On April 28, 1995, the court executed a Stipulated Consent Decree effectively resolving the relief requested by CNG in Count One of the complaint.

In Count Two of the Complaint CNG requested a declaratory judgment establishing that the width of the easement be designated as fifty feet.

The sole issue now before the court for resolution is the width of the easement owned by CNG which extends across the property of Stitt.

FINDINGS OF FACT

1. Plaintiff CNG Transmission Corporation ("CNG") is a Delaware corporation maintaining its principal place of business at 445 West Main Street, Clarksburg, West Virginia 26302-2450, and is engaged in the business of producing, purchasing, transporting, selling for resale and storing natural gas in interstate commerce. It has the power of eminent domain under the Natural Gas Act, 15 U.S.C.A. § 717 et seq. (the "Act"). (Tr. at 3).

2. As a natural gas company engaged in interstate commerce, CNG is regulated by the Department of Transportation as well as by the Federal Energy Regulatory Commission ("FERC") pursuant to the provisions of the Act. CNG transports natural gas in interstate commerce for and to local distribution

companies and others for ultimate consumption by the general public. (Tr. at 3).

3. Defendant Paul H. Stitt ("Stitt") is an individual having an address of 159 Stitt Road, Beaver Falls, PA 15010. He is the owner of certain property located in South Beaver Township, Beaver County, Pennsylvania, through which runs an easement owned by CNG. (Tr. at 3).

4. On or about March 11, 1968, at Docket No. CP67-307, the Federal Power Commission, the predecessor to FERC, issued to Consolidated Gas Supply Corporation ("CGSC"), the predecessor in interest to CNG, a Certificate of Public Convenience and Necessity to construct, operate and maintain a thirty-inch natural gas pipeline designated TL-400 (the "Pipeline" or "TL-400") for the transportation of natural gas between Warren County, Ohio and Beaver County, Pennsylvania. (Tr. at 4).

5. In 1968, Stitt owned three adjoining and contiguous tracts of land located in South Beaver Township, Beaver County, Pennsylvania, through which was to run approximately 2,185 feet of the pipeline. Because CGSC was unable to reach a consensual agreement with Stitt, it passed a resolution of its Board of Directors on April 29, 1968, wherein it appropriated an easement across the lands of Stitt (the "Resolution"). (Tr. at 4).

6. The Resolution does not specifically set out the width of the CNG easement across the lands of Stitt. It does state, however, that the easement was taken so as

to "construct, operate, and maintain a thirty-inch pipeline over and across" the lands owned by Stitt. (Pl.'s Ex. 1).

7. On or about June 18, 1968, CGSC filed a Petition for Approval and Order for filing Bond in the Court of Common Pleas of Beaver County, Pennsylvania, at No. 548-1968, by which it sought the approval of the bond and the right to enter onto and enjoy the easement. (Tr. at 5). In that regard, E. Earl Autenreith, Esquire, attorney for CGSC, the predecessor to CNG, filed an affidavit in order to obtain a Writ of Possession pursuant to the Eminent Domain Code of 1964 and declared that the estimated just compensation was in the sum of $4,000.00.

8. Following the denial of Preliminary Objections filed by Stitt, the Court of Common Pleas of Beaver County permitted the filing of the bond by Order dated August 27, 1968, and issued a further Order granting CNG possession of the easement on September 10, 1968. (Tr. at 6).[2] At that time, the Honorable James E. Rowley, Judge of the Court of Common Pleas of Beaver County, entered an Order authorizing and directing the payment of $4,000.000 [sic], as the estimated just compensation in the grant of the Writ of Possession for entry pursuant to the Eminent Domain Code of 1964.

9. On April 6, 1995, CNG filed with this Court a Verified Complaint, a Motion for Preliminary Injunction,

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[2]Although the Plaintiff alleges in paragraph ten of the complaint that CNG was granted possession of the easement, and although paragraph ten was admitted by the Defendant, it would appear that the easement was granted to CGSC. CGSC is the predecessor to CNG.

and a Motion Requesting Hearing Date on Preliminary Injunction. The Complaint was composed of two Counts. The first Count sought a preliminary and permanent injunction: (1) restraining Stitt from interfering with the replacement of 548 feet of the original TL-400 with a slightly thicker walled pipeline to be laid at the same depth and in the same easement; (2) requiring Stitt to allow CNG personnel and contractors to enter his property so as to access the pipeline and; (3) ordering any relief that is fair and just.

10. Because of increases in population density along the area of the pipeline where the Stitt property is situated, it became necessary for CNG to increase the thickness of the pipeline to comply with federal safety mandates. Compl. ¶14. See also Tr. at 10-12, 28, and 32.

11. On April 28, 1995, this Court signed a Stipulated Consent Decree wherein the Parties agreed that Stitt was enjoined from interfering with CNG's placement of the thicker walled pipe. That injunction effectively gave CNG the relief it requested in Count I of the Complaint. Work was completed on the Pipeline across Stitt's property in the Spring of 1995.

12. Count II of the Complaint requests a declaratory judgment establishing the width of CNG's easement across Stitt's property to be fifty feet. On April 24, 1995, Stitt filed an answer denying the substantive allegations of Count II of the Complaint. No counterclaim was filed with Stitt's answer.

13. Stitt does not deny that CNG owns an easement across his property, but he contests the width of

that easement. The sole issue presently before this Court is to determine the width of CNG's easement.

14. The only witness to testify for CNG was Thomas P. Virden (Virden). Virden has been employed by CNG for thirty one years, first as a division engineer, then as a district superintendent, and for the past twelve years as a senior staff engineer and project manager. He is based in Clarksburg, West Virginia. His duties require him to be involved in pipeline construction from the conception of the project to its design and installation, as well as in the repair of the pipeline after installation. (Tr. at 7-8). Virden was personally involved in the placement of the thicker walled pipeline on the property of Stitt during the Spring of 1995 and was frequently on Stitt's property during the construction period. (Tr. at 16).

15. The type of pipeline placed on the Stitt property is composed of forty to fifty-foot lengths of high grade steel welded together. It is occasionally necessary to repair and maintain the pipeline after it is put into the ground for a variety of reasons including age, size, and population density. In order to affect [sic] repairs on a pipeline, it is necessary to excavate around the pipeline so that it is exposed, thus allowing workers to enter the ditch around the pipeline and to perform the necessary repairs and/or maintenance. (Tr. at 10-12).

16. The Pipeline underneath the Stitt property is buried approximately three feet below the surface of the ground. In order to excavate around the pipeline and comply with regulations of the Occupational Safety and Health Administration ("OSHA"), it is necessary to dig a ditch six and one half feet below ground level. (Tr. at 12, 14).

17. OSHA regulations also require that the opening exposing the pipeline be eight feet wide at ground level which measures four feet on each side of the pipeline. OSHA regulations also require that vehicles not utilize a two feet area on both sides of the eight-foot opening; this requirement minimizes the danger of a collapse of the ditch walls. (Tr. at 15).

18. In addition to the OSHA regulations, in terms of area requirement, it is also necessary to have: (1) a three-foot wide area on one side of the pipeline in order to accommodate segments of the pipeline which are taken out of the ditch; (2) a twelve-foot wide area to accommodate the track width of the equipment necessary to perform work on the pipeline and; (3) a three-foot, six-inch area which is used to maneuver the equipment. (Tr. at 14-15). The total distance is twenty- five feet, measuring from one side of the pipeline.[3]

19. On the opposite side of the pipeline it is necessary to have a similar twenty-five-foot area to store dirt taken from the ditch as well as to accommodate construction equipment. (Tr. at 15-16).

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[3]The twenty-five foot area is comprised of: (1) the opening exposure which measures four feet; (2) the two-foot area which cannot be used by construction equipment; (3) the three-foot area used to store or place the extracted pipe; (4) the twelve-foot area used to accommodate the track width of the equipment and (5) the three-foot, six-inch area which is used to maneuver the equipment. The exact area is twenty-four feet, six inches.

20. The vehicles necessary to work on thirty-inch pipelines include excavators, bulldozers and sidebooms. This equipment ranges in weight from twenty-five to forty-seven tons and has a tread width of between twelve and fourteen feet. The length of the booms on some pieces of equipment effectively enlarges its effective size and consequently increases the space necessary for its operation. (Tr. at 16-22).

21. Approximately 548 feet of the 987 feet of pipeline on Stitt's property was replaced in the Spring of 1995 because of the change in class location of the area. (Tr. at 22, 32).

22. During construction on the Stitt property in the Spring of 1995, a total area of fifty feet (twenty-five feet on each side of the pipeline) was utilized to perform the work. (Tr. at 16). Virden testified that a fifty-foot easement is necessary on the Stitt property in order to ensure that the Pipeline can be properly repaired and maintained. (Tr. at 28).

23. Robert F. Amalia (Amalia) attended and testified at the evidentiary hearing on behalf of Stitt. His testimony fundamentally related to the Board of Viewers hearing conducted in Beaver County in 1968.[4]

24. Amalia is competent to testify only to statements which he personally made during the course of the Board of Viewers hearing.

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[4]Amalia was provided with a copy of the transcript of testimony presented during the course of the viewers hearing to refresh his recollection.

25. Even assuming, arguendo, that Amalia is competent to relate to this court statements made by other witnesses during the course of the Board of Viewers hearing, the evidence submitted by Stitt fails to overcome the burden of proof which has been adequately met by CNG.

26. The sole issue before the court is the width of the easement and not whether Stitt was paid just compensation.[5]

27. The question of just compensation represents a separate and distinct issue which cannot be addressed in this action and/or on the basis of this record.

28. A fifty-foot easement is necessary for CNG to properly enjoy the use of its easement on the Stitt property.

CONCLUSIONS OF LAW

1. This Court has personal jurisdiction over Defendant. Venue is proper under 28 U.S.C. § 1391(b).

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this action involves substantial questions arising under federal laws, including laws regulating interstate commerce and Federal common

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[5]Count II of the Complaint requested a declaratory judgment establishing the width of the easement to be fifty feet. Stitt filed an answer effectively denying the allegations of the Complaint. No counterclaim was included in the answer.

law. CNG's operations, including its operation of the pipeline, are subject to federal regulation under the Act and accompanying regulations.

3. Pursuant to Pennsylvania law, ambiguous easements are construed to permit the grantor the "reasonable and necessary' use of the right of way within the purpose of the easement and the intentions of the original parties to the grant." Zettlemoyer v. Transcontinental Gas Pipeline Corp., 657 A.2d 920, 926 (Pa. 1995) (internal citations omitted).

4. Where the width of an easement is not specified in a grant and where the grant is for a particular object, the width must be suitable and convenient with respect to that object. Lease v. Doll, 403 A.2d 558, 561 n.5 (Pa. 1979). Further, where the grant of an easement is unrestricted, the grantee is given such rights as are necessary for the reasonable and proper enjoyment of the easement. Taylor v. Heffner, 58 A.2d, 450, 453 (Pa. 1948).

5. Here, the easement was appropriated for the construction, operation and maintenance of a thirty-inch gas pipeline and thus the easement must be of a sufficient width to permit CNG to reasonably operate and maintain the pipeline. Both federal district courts and state courts have consistently held that a fifty-foot easement is necessary and appropriate in cases dealing with gas pipelines. See Columbia Gas Transmission Corp. v. Tarbuck, 62 F.3d 538 (3d Cir.1995); See also Columbia Gas Transmission Corp. v. Savage, 863 F. Supp. 198 (M.D. Pa. 1994); Columbia Gas Transmission Corp. v. Burke, 768 F. Supp. 1167 (N.D.W.Va. 1990).

Discussion

Stitt claims that CNG acquired and only paid for a thirty-inch easement. CNG argues that because of an ambiguity in the creation of the easement, its width should extend to a distance of fifty feet.

In determining the bounds of an easement, the court must consider the intention of the parties. Zettlemoyer v. Transcontinental Gas Pipeline Corp., 657 A.2d 920, 924 (Pa. 1995), citing Lease v. Doll, 403 A.2d 558, 561 (Pa. 1979). "Such intention is determined by a fair interpretation and construction of the grant and may be shown by the words employed (and) construed with referenced to the attending circumstances known to the parties at the time the grant was made." Lease, 403 A.2d at 561. Consequently, when the precise width is not specified in the instrument which grants the right-of-way, the easement "will be held to be of such width as is suitable and convenient with reference to the object." Id. at 561 n. 5 (quoting 28 A.L.R. 2d 253 (1953)).

Here, the resolution states that its intent is to acquire a "right-of-way to construct, operate and maintain a thirty-inch pipeline over and across certain land . . . owned . . . by Paul H. Stitt . . . ." Clearly, the language of the resolution does not state that the width of the easement is thirty inches. In that regard, the number "30" relates to the size of the pipeline and not the width of the easement. Consequently, because the width of the easement is unrestricted, CNG should be provided with such rights as are necessary to utilize the right-of-way. "Under Pennsylvania law, ambiguous easements are construed to provide the grantee the 'reasonable and necessary' use of the right-of-way within the purpose of the easement and

the intentions of the original parties to the grant," Columbia Gas Transmission Corp. v. Tarbuck, 62 F.3d 538 (3d Cir. 1995), citing Zettlemoyer, 657 A.2d at 926.

The pipeline situated beneath the Stitt property is buried approximately three feet below the surface of the ground. To excavate around the pipeline and to comply with the relevant regulations of the Occupational Safety and Health Administration (OSHA), it is necessary to dig a ditch six and one half feet below the ground level. OSHA regulations also require that the opening which exposes the pipeline be eight feet wide at ground level. Furthermore, OSHA regulations require that a distance of two feet on each side of the eight-foot opening cannot be utilized by vehicles, which minimizes the danger of a collapse of the ditch walls. it is also necessary to have a three-foot wide area on each side of the pipeline to accommodate segments of the pipeline taken from the ditch, a twelve-foot wide area to accommodate the track width of the construction equipment which is necessary to work on the pipeline and a three-foot, six-inch area which is used to maneuver the equipment. This evidence adequately establishes that fifty feet is necessary to "operate and maintain" a thirty-inch gas pipeline.

Finally, the court can make no determination relating to the question of whether Stitt was paid just compensation for a fifty-foot easement. First, he has filed no counterclaim claiming that he has not received just compensation in the event that the court would establish the length of the easement to be fifty feet. Secondly, although the question of the width of the easement was raised by Amalia at the Board of Viewers hearing, the court, in this action and/or on the basis of this record, cannot discern whether Stitt was awarded just

compensation for a thirty-inch easement [or] a fifty-foot easement.[6]

November 30, 1995 *Francis X. Caiazza*

Dated

Francis X. Caiazza
U. S. Magistrate Judge

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[6]Although the affidavit submitted by CGSC to obtain the Writ of Possession stated that the just compensation was in the amount of $4,000, the Board of Viewers awarded total damages to Stitt in the sum of $38,000.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3700

CNG TRANSMISSION CORPORATION

v.

PAUL H. STITT,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 95-00526)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MCKEE, Circuit Judges, and FISHER, District Judge*

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*Honorable Clarkson S. Fisher,, Senior Judge of the United States District Court for the District of New Jersey, sitting by designation.

The petition for rehearing filed by the appellant, Paul H. Stitt, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

/s/
Circuit Judge

DATED: SEP 16 1996